No. 15711
IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARTHUR TUGGI BRUNNER,

Appellant,

vs.

ALBERT DEL GUERCIO, as District Director, Immigration and Naturalization Service, Los Angeles, California,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Regulations

Statutes

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APPELLEE'S BRIEF.

Jurisdiction.

The District Court had jurisdiction of the action for review of a final order of deportation pursuant to Title 28, United States Code, Section 2201, and Title 5, United States Code, Section 1009, as alleged in the complaint [R. 3].

This Court has jurisdiction to review the judgment of the District Court [R. 14-20], that the deportation order is a "valid order," pursuant to the provisions of Title 28, United States Code, Sections 1291 and 1294(1), the judgment of the District Court being a final order.

Statutes and Regulations Involved.

Section 241(a)(1) of the Immigration and Nationality Act (8 U. S. C. 1251(a)(1) (1952 Ed.)) reads as follows:

"Sec. 1251. *Deportable Aliens—General classes.*

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry."

Section 212(a)(22) of the same Act (8 U. S. C. 1182(a)(22) (1952 Ed.)) reads as follows:

"Sec. 1182. *Excludable classes of aliens.* * * *

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: * * *

(d)(7) The provisions of subsection (a) of this section, except paragraphs (2), (21) and (26) of said subsection, shall be applicable to any alien who shall leave Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States. * * *"

Section 101 (a)(13) of the same Act (8 U. S. C. 1101(a)(13) (1952 Ed.)) reads as follows:

"Sec. 1101. *Definitions.*

(a) As used in this chapter—

(13) the term 'entry' means any coming of an alien into the United States, from a foreign port or place or from any outlying possession, whether voluntary or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purpose of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying

possession was not voluntary: *Provided,* That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception."

Section 315(a) of the Immigration and Nationality Act (8 U. S. C. 1426(a)(b) (1952 Ed.)) reads as follows:

"Sec. 1426. *Citizenship denied alien relieved of service in armed forces because of alienage; conclusiveness of records.*

(a) Notwithstanding the provisions of section 405(b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien. June 27, 1952, c. 477, Title III, ch. 2, §315, 66 Stat. 242."

Title 8, United States Code, Section 210(b) and (f) (1942 Ed.), reads as follows:

"Sec. 210. *Reentry permits.*

* * * * * * * *

(b) *Issue by Commissioner with approval of Attorney General; life of permit; form and contents of permit; photograph attached.* If the Commissioner of Immigration and Naturalization finds that the alien has been legally admitted to the United States,

and that the application is made in good faith, he shall, with the approval of the Attorney General, issue the permit, specifying therein the length of time, not exceeding one year, during which it shall be valid. The permit shall be in such form as shall be by regulations prescribed and shall have permanently attached thereto the photograph of the alien to whom issued, together with such other matters as may be deemed necessary for the complete identification of the alien.

* * * * * * * *

(f) *Effect of permit on rights of alien.* A permit issued under this section shall have no effect under the immigration laws, except to show that the alien to whom it issued is returning from a temporary visit abroad; but nothing in this section shall be construed as making such permit the exclusive means of establishing that the alien is so returning."

Section 101(a)(19) of the Immigration and Nationality Act (8 U. S. C. A. 1101(a)(19)) reads as follows:

"(19) The term 'eligible to citizenship,' when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76), or under any section of this Act, or any other Act, or under any law mandatory of, supplementary to, or in substitution for, any of such sections or Acts."

Section 4(a) of the Selective Service Act of 1948 (62 Stat. 605; 50 U. S. C. A. App. 454(a)), at the time herein involved reads, in part, as follows:

> "Sec. 4(a). * * * Any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *"

Section 6.1(b)(2) and (c) of the Immigration and Naturalization Regulations (8 C. F. R. 6.1(b), (c), revised 1952), relating to the Board of Immigration Appeals, provides:

> "(b) *Appellate jurisdiction.* Appeals shall lie to the Board of Immigration Appeals from the following: * * *
>
> (2) Decisions of special inquiry officers in deportation cases, as provided in Sec. 242.61 of this chapter; * * *
>
> (c) *Jurisdiction by certification.* The Assistant Commissioner, Inspections and Examinations Division, or the Board may in any case arising under paragraph (b)(1) through (6) of this section require certification of such case to the Board."

The regulations which were applicable at the time of this case were those enacted in December of 1952, which were effective until new regulations came out in 1956.

Sections 242.61(c) and (3) of the Code of Federal Regulations, Title 8 (revised 1952 Ed.), provides as follows:

> "(c) *Order of special inquiry officer.* The order of the special inquiry officer shall be (1) that the alien be deported, or (2) *that the proceedings be terminated,* * * *. (Emphasis added.)
>
> (e) *Finality of order.* The order of the Special Inquiry Officer shall be final except when:
>
> (1) the case has been certified as provided in Section 7.1(b) or 6.1(c); or
>
> (2) an appeal is taken to the Board of Immigration Appeals."

Statement of the Case.

A certified copy of the Immigration File on which the final order of deportation is based, was offered in evidence as Exhibit A, for review by the court, and is before this Court in its original form, pursuant to stipulation of the parties.

This is a case in which the appellant, an alien, first entered the United States for permanent residence at New York in October of 1949, and on or about April 2, 1951, executed Selective Service Form No. 130, which is the Alien's Application for Relief from Training and Service in the Armed Forces, and which application bears with it, as will be seen from the provisions quoted below, the loss of eligibility to become a citizen.

SSS Form No. 130 is contained in the Immigration File [Ex. A in evid.] as Exhibit 5 attached to the original hearing and contains the following quotation above the signature:

> "I hereby apply for relief from liability for training and service in the armed forces of the United

States, I have read the NOTICE given below, and I understand that I will forever lose my right to become a citizen of the United States, and I may also be prohibited from entry into the United States or its territories or possession as a result of filing this application."

The NOTICE referred to in the above quotation is contained at the bottom of the SSS Form No. 130 and reads as follows:

"NOTICE.

Section 4(a) of the Selective Service Act of 1948 provides in part that 'Any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title if, prior to his induction in the armed forces, he had made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application *shall thereafter be debarred from becoming a citizen of the United States.*' (Emphasis added.) Under other existing law, an alien who is not a permanent lawful resident of the United States at the time of execution of this application, thereafter becomes barred from ever making an entry for permanent residence into the United States, including Alaska, Hawaii, Puerto Rico, and the Virgin Islands, unless he enters as a minister of any religious denomination or as a professor of a college, academy, seminary, or university."

Appellant subsequently re-entered the United States at Honolulu on a re-entry permit and as of April 23, 1953, and on March 12, 1954, arrived in the United States at Seattle, Washington. In January of 1955 a warrant

of arrest was served on appellant at Miami, Florida, charging that he was deportable under Section 241(a)(1) of the Nationality Act (8 U. S. C. 1251(a)(1) (1952 Ed.)) (*supra*) in that at the time of entry he was one of a class of aliens excludable under Section 211(a)(22) (8 U. S. C. 1182(a)(22) (1952 Ed.)) (*supra*) in that he was ineligible to citizenship under Section 4(a) of the Selective Service Act because he had applied for exemption from service.

A hearing was held before a Special Inquiry Officer and the Special Inquiry Officer determined that the plaintiff was erroneously granted re-entry permits by the Immigration Service on December 8, 1952 and on March 18, 1953, after he had become ineligible to citizenship and that therefore he was not deportable and ordered that the proceedings in the case be "terminated" and that "the Board of Immigration Appeals has directed that this case be certified to that Board and the final order will be entered in this case by the Board. * * *"

The Board of Immigration Appeals, on August 30, 1955, ordered the Special Inquiry Officer's order withdrawn and determined that there was no estoppel as a matter of law by reason of the issuance of the two prior re-entry permits after the plaintiff became ineligible for citizenship, and that the plaintiff was deportable and, after considering a motion to reconsider, denied said motion and entered its final determination on February 26, 1956.

Summary of Argument.

I.

APPELLANT WAS GIVEN NOTICE THAT THE CASE WAS CERTIFIED TO THE BOARD OF IMMIGRATION APPEALS AND THAT HE HAD TEN DAYS TO FILE ANY WRITTEN MATTER OR REQUEST FOR ORAL ARGUMENT; THE FACT THERE IS NO WRITTEN DIRECTION FROM THE BOARD OF IMMIGRATION APPEALS THAT THE RECORD BE CERTIFIED IS IMMATERIAL.

II.

THE BOARD'S ORDER THAT THE "ORDER OF DEPORTATION BE REINSTATED" IF THE ALIEN DID NOT TAKE ADVANTAGE OF ITS GRANT OF VOLUNTARY DEPARTURE IS A SUFFICIENT ENTRY OF AN ORDER OF DEPORTATION; SUBSEQUENT MOTIONS BY APPELLANT THAT THE BOARD RECONSIDER ITS ORDER OF DEPORTATION WERE SO PREDICATED.

III.

ISSUANCE OF A RE-ENTRY PERMIT IS NO GUARANTY OF NONDEPORTABILITY AND DOES NOT ESTOP THE GOVERNMENT FROM EXCLUDING OR DEPORTING FOR CAUSE.

IV.

THERE IS REASONABLE, SUBSTANTIAL AND PROBATIVE EVIDENCE THAT APPELLANT MADE AN INTELLIGENT WAIVER OF HIS RIGHT TO CITIZENSHIP WHEN HE SIGNED SELECTIVE SERVICE FORM 130.

I.

Appellant Was Given Notice That the Case Was Certified to the Board of Immigration Appeals and That He Had Ten Days to File Any Written Matter or Request for Oral Argument; the Fact There Is No Written Direction From the Board of Immigration Appeals That the Record Be Certified Is Immaterial.

The Board of Immigration Appeals had jurisdiction to withdraw the order of the Special Inquiry Officer and to determine that appellant was deportable. The applicable regulations are Section 6.1(b)(2) and (c) and Section 242.61(c) and (e), *supra.*

The order of the Special Inquiry Officer [Ex. A in evid. p. 66] reads as follows:

> "ORDER: It is ordered that the proceedings in this case be terminated.
>
> The Board of Immigration Appeals has directed that this case be certified to that Board and the final order will be entered in this case by the Board. You will be allowed ten days in which to submit to this office any brief, memorandum, or request for oral argument, which you desire to be transmitted with the record in this case, for consideration by the Board."

The order of the Board of Immigration Appeals [Ex. A in evid. p. 59] reads as follows:

> "ORDER: It is ordered that the order of the special inquiry officer dated March 21, 1955 be withdrawn.
>
> It Is Further Ordered that an order of deportation be not entered at this time but that the alien be required to depart from the United States with-

out expense to the Government within such period of time and under such conditions as the officer in charge of the District deems appropriate.

It Is Further Ordered that if the alien does not depart from the United States in accordance with the foregoing, the order of deportation be reinstated and executed."

The regulations, summarized *supra,* provide that the Board of Immigration Appeals may require certification of any decisions of special inquiry officers to the Board and that an order of the special inquiry officer shall be final except when the case has been certified to the Board.

The real question here is whether or not the Board required certification of this case to the Board of Immigration Appeals. It is conceded that the only evidence that such is the case is contained in the order of the special inquiry officer to the effect that "the Board of Immigration Appeals has directed that this case be certified to the Board and the final order will be entered in this case by the Board. * * *" It is upon this state of facts that the District Court found that the Board of Immigration Appeals had jurisdiction to review and withdraw the order of the special inquiry officer. It seems a valid inference from the order of the special inquiry officer that the Board of Immigration Appeals desired the case to be certified, and further from the fact that the Board of Immigration Appeals did review the case, and withdrew the order of the special inquiry officer, it is clear they did desire to review the matter, and there appears to be sufficient evidence from which to infer that the Board did require that the case be certified to it.

It is not essential that there be in the file a written request from the Board for certification. This was, of

course, the view of the District Court, whose finding was that there was "no written direction of the Board" [R. 17, 19]. It cannot be said that there is a lack of any evidence that the case was certified in accordance with regulations.

II.

The Board's Order That the "Order of Deportation Be Reinstated" if the Alien Did Not Take Advantage of Its Grant of Voluntary Departure Is a Sufficient Entry of an Order of Deportation; Subsequent Motions by Appellant That the Board Reconsider Its Order of Deportation Were so Predicated.

The formal order of the Board of Immigration Appeals, dated August 30, 1955 [Ex. A in evid. p. 59], reads as follows:

> "ORDER: It is ordered that the order of the special inquiry officer dated March 21, 1955 be withdrawn.
>
> It Is Further Ordered that an order of deportation be not entered at this time but that the alien be required to depart from the United States without expense to the Government within such period of time and under such conditions as the officer in charge of the District deems appropriate.
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> It Is Further Ordered that if the alien does not depart from the United States in accordance with the foregoing, the order of deportation be reinstated and executed."

Subsequently, on January 9, 1956 [Ex. A, p. 19], the Board stayed its deportation of plaintiff pending further consideration and made its order that oral argument on

the motion be granted. On February 24, 1956 [Ex. A, p. 7], the Board said:

> "The matter comes before us on motion of counsel requesting reconsideration of our order of August 30, 1955, in which we found the respondent subject to deportation on the ground stated above and granted the respondent the privilege of voluntary departure in lieu of deportation."

The Board concluded to deny the motion for reconsideration.

It is clear that if the appellant had taken advantage of the Board's grant of voluntary departure, that there would have been no order of deportation outstanding against the appellant. But it is equally clear that since the appellant declined to voluntarily depart that the provision of the Board's order for "reinstatement" came into operation and the order of deportation became effective. The subsequent proceedings, including the motion for reconsideration and its denial, and the several notices to appellant, requesting his appearance for deportation pursuant to the order, leave little doubt about this fact.

III.

Issuance of a Re-entry Permit Is No Guaranty of Nondeportability and Does Not Estop the Government From Excluding or Deporting for Cause.

It is now Hornbook law that the "entry" upon which a deportation is based can be "any entry," prior or subsequent to the Act or basis upon which the deportation is predicated. Likewise, the statute makes it clear that the issuance of a permit to re-enter "shall have no effect under the Immigration laws, except to show that the alien to whom it issued is returning from a temporary visit abroad." (8 U. S. C., Sec. 210(s).)

I.

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The Government has no duty to warn aliens of the possible effect of an exit and re-entry and therefore cannot be estopped by reason of a failure to so warn even if estoppel were available as to the Government, which appellant concedes it is not (App. Br. 15). Not only is this sound law, it is apparent that if the rule were otherwise it would put an impossible administrative burden on the Immigration Service and would for all practical purposes nullify the grounds of deportation which are based upon a condition of "entry." As the court said in *Savoretti v. Violer,* 214 F. 2d 425 (C. A. 5, 1954), "the word 'entry' has acquired a special meaning in judicial interpretation of immigration statutes." It has become a word of art. This was the court's conclusion even prior to the enactment of the 1952 definition of the word "entry" (*supra*).

Nor can the Immigration Service be bound by the unauthorized acts of its agents in issuing a re-entry permit, if it was "error" to issue such a permit. It must be remembered that the re-entry permit does not guarantee the right of re-entry, it is a document which, like a visa, is limited, by statute, in its scope (*Zacharias v. McGrath,* 105 Fed. Supp. 421).

The re-entry permits here involved are contained in the Immigration File as Exhibits II and IV attached to the hearing of February 25, 1955, and provide on their face that

> "Pursuant to provisions of Section 223 of the Immigration and Nationality Act, this permit is issued to bearer * * * an alien previously lawfully admitted to the United States, to re-enter the United States, *if otherwise admissible.* * * *" (Emphasis added.)

IV.

There Is Reasonable, Substantial and Probative Evidence That Appellant Made an Intelligent Waiver of His Right to Citizenship When he Signed Selective Service Form 130.

There is no question but that on or about April 2, 1951, appellant signed SSS Form No. 130 [Ex. A in evid.; Ex. V], "Application by Alien for Relief from Training and Service in the Armed Forces," which contains the material indicated under our Statement of the Case, to the effect that such applicant would

> "forever lose my right to become a citizen of the U. S., and I may also be prohibited from entry into the United States or its territories or possessions as a result of filing this application."

Appellant now makes the argument that he did not sign that form with an intelligent understanding of the rights he was waiving. Yet, on March 7, 1951, and prior to the signing of that form, he wrote a letter to Local Board No. 5 [Ex. A in evid. p. 113] which stated in part,

> "After careful consideration I find I do not like to lose my chances of becoming a citizen. The main reason for my not desiring draft into the Army is because I do so much wish to go into the Air Force. * * *"

When asked, during the hearing, by the Special Inquiry Officer, "Well, Mr. Brunner, if you tried to enlist in the Air Force why did you file this Application (referring to SSS Form 130)?" the appellant answered, "I didn't think this application refers to me at all. All I thought it was getting out of training. I didn't have anything against serving in the Armed Forces."

The lower court apparently thought this was a rather weak explanation in light of the above letter, and affirmed the decision of the Board of Immigration Appeals.

Conclusion.

It is respectfully submitted that the decision of the District Court, affirming the decision of the Board of Immigration Appeals that appellant is deportable, be affirmed.

Respectfully submitted,

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